

**COURT OF COMMON PLEAS  
FOR THE STATE OF DELAWARE**  
WILMINGTON, DELAWARE 19801

*John K. Welch*  
*Judge*

November 6, 2009

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**Re:   *State of Delaware v. Nabil Abdallah***  
**Case No.: 0810023856**

**Date Submitted: November 2, 2009**  
**Date Decided: November 6, 2009**

**MEMORANDUM OPINION**

Dear Counsel:

A bifurcated trial in the above captioned matter took place on Monday, July 13, 2009 and continued to Monday, November 2, 2009 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

The defendant Nabil Abdullah (the “defendant”) was charged with one Count Driving Under the Influence by Information in violation of 21 *Del.C.* §4177(a) filed with the Clerk of the Court by the Attorney General.<sup>1</sup>

### **THE FACTS**

Ms. Diane Mooney (“Mooney”), a civilian fact witness for the State, testified at trial. Mooney was at the Speedy Gas Station on October 30, 2008 and recently got off work. Mooney stopped to get gas and fill up her motor vehicle and she observed the defendant’s car pull up to the gas station and back his motor vehicle up towards her motor vehicle. Mooney felt her car “move up” and was pushed sideways and heard an impact to her motor vehicle. She came around and pulled in front of defendant and asked him, “Do you realize you hit me?” Mooney then observed the dents in her motor vehicle. She identified the defendant in the courtroom. Defendant then moved his motor vehicle in front of the pump and pumped his gas. She spoke with the defendant about the accident and testified he “kept repeating himself”. The defendant allegedly asked her, “Wouldn’t your insurance cover it?”

Mooney testified the accident occurred at approximately 4:30 p.m. It cost \$700.50 to repair her motor vehicle. According to Mooney, she did not make any

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<sup>1</sup> The charging documents allege defendant “...on or about the 30<sup>th</sup> day of October, 2008, in the County of New Castle, State of Delaware, did drive a vehicle upon SPEEDY GAS STATION PARKING LOT 1205 CAPITAL TRAIL, Newark, Delaware while under the influence of alcohol or any drug or a combination of drugs and alcohol or with a prohibited alcohol content as set forth in Section 4177 of Title 21, or when said persons blood contains illicit or recreational drug as set forth in Section 4177 of Title 21.”

observations about alcohol from defendant's person, but she is "100 percent sure" the defendant was the person who struck her motor vehicle in the courtroom.

Mooney identified the defendant's motor vehicle as a green Toyota 4-Runner.

Trooper First Class Daniel A. DeFlaviis ("Trooper DeFlaviis") presented testimony on behalf of the State at trial. He is employed at Troop 6 of the Delaware State Police since December 2006. He has performed 30 DUI related investigations and normally has uniformed patrol duties including enforcement of traffic laws and criminal complaints. He was dispatched to the location of 1205 Capital Trail Road in New Castle County on the date set forth in the Information. He interviewed Mooney and reiterated much of her sworn testimony.

Trooper DeFlaviis also identified the defendant in the courtroom. When he spoke with the defendant, the defendant's eyes were "glassy and watery". He also observed while the defendant was in the gas station speaking to the attendant he had significant balancing issues and was "leaning on the counter". Defendant was embroiled in an argument over \$10.00 in fuel costs with the attendant. Trooper DeFlaviis described the defendant's demeanor as "disoriented" and "he had a problem understanding the officer's questions".

Trooper DeFlaviis described the defendant's speech as "mumbled, confused and slurred". Trooper DeFlaviis performed field sobriety tests on the defendant who had informed the officer that he had not been drinking that day. The officer did not observe an odor of alcoholic beverage.

The defendant was administered the Horizontal Gaze Nystagnus (“HGN”) test without objection by defense counsel which met the foundational test for HGN in *Zimmerman v. State*, 693 A.2d 311 (Del. 1999). Defendant was also given the Alphabet and Counting Test. Defendant was instructed to recite the alphabet D through G which he failed to perform successfully. On the Counting Test defendant was instructed to repeat 79 through 59 which he could not perform successfully. On the Horizontal Gaze Nystagnus Test the officer testified that the defendant voluntarily performed the test and understood his instructions. The officer testified with all six (6) clues present there is a 77% correlation statistically that defendants BAC is .08. The defendant exhibited all six (6) clues of the HGN test.

On the Walk and Turn Test, the second field coordination test, Trooper DeFlaviis testified two (2) clues constitute a failure and there is a 68% statistical correlation that defendant has a greater than .08 BAC. When two (2) clues exist, according to Trooper DeFlaviis, there is an 80% correlation when combined with the Horizontal Gaze Nystagnus Test according to Trooper DeFlaviis. The defendant also failed the Walk and Turn Test. On Steps 1 through 9. He missed step 1, he missed heel-to-toe on 2, 3 and 4; he stepped off the line on steps 2, 3 and 4 and raised his arms on step 5. Defendant also did the spin around counter circular turn contrary to Trooper DeFlaviis’ instructions. On the second 9 steps back he raised his arms on steps 3, 4, 5 and 6 and a total of four (4) clues was exhibited by defendant and was constituted a failure.

The defendant was also given the One-Legged Stand Test. The officer testified that two (2) clues is a failure and there is a statistical correlation of 60% that the defendant has a BAC of .08 or greater. The defendant failed that NHTSA Field coordination test with four (4) clues.

Based upon this record and the performance on the tests the officer believed the defendant was under the influence and was taken to Omega Medical Facility for a blood draw.<sup>2,3</sup>

The defendant took the stand and testified he has a high school education and “wasn’t sure if he was involved in an accident”, but otherwise understood all the officer’s instructions. The defendant admits that he became embroiled in a dispute with the attendant over \$10.00 worth of gas. Defendant testified he didn’t smoke marijuana that day and did not have any alcohol in his system.

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<sup>2</sup> The State previously moved in the Officer’s Delaware State Police Academy Award for NHTSA-DUI Detection and Horizontal Gaze NYSTAGMUS Certification as State’s Exhibit No.: 1. The State moved in, without any objection from defense all the medical blood draw records from the Delaware State Police Chemical Test as State’s Exhibit No.: 2. Those records indicated the chemical test report was Complaint No.: 06-08-101268 with citation no.: T06080108355. The State moved in, without objection, the driving under the influence laboratory report as State’s Exhibit No. 3, which indicated the defendant tested positive for “Cannabinoids cross-reactive” and benzodiazepine cross-reactive”. Under the OCME Confirmations, the cannabinoid confirmation blood was 4.2 ng/mL and the By GCMS by blood was 58 ng/mL.

<sup>3</sup> Trooper DeFlaviis testified that he took defendant to Omega and had blood samples drawn by Pat Moore, who is the Phlebotomist and he gave Pat Moore a blood-kit test ID No.: 1281. The blood was drawn from the defendant and he took it back to the Troop and marked it in the refrigerator as a sealed kit. All this testimony was received without objection. Later, according to established procedures, the blood was tested by DHSS and those results are in the evidence.

## THE LAW

### **Sec. 4177. Driving a vehicle while under the influence or with a prohibited alcohol content; evidence; arrests; and penalties**

- (a) No person shall drive a vehicle:
  - (1) When the person is under the influence of alcohol;
  - (2) When the person is under the influence of any drug;
  - (3) When the person is under the influence of a combination of alcohol and any drug;
  - (4) When the person's alcohol concentration is .08 or more; or
  - (5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.
- (b) In a prosecution for a violation of subsection (a) of this section:
  - (1) The fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.
  - (2) a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.

- b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.
- (3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (a) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).
- (c) For purposes of subchapter III of Chapter 27 of this title, this section and § 4177B of this title, the following definitions shall apply:
  - (1) "Alcohol concentration of .08 or more" shall mean:
    - a. An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood; or
    - b. An amount of alcohol in a sample of a person's breath equivalent to .08 or more grams per two hundred ten liters of breath.
  - (2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

- (3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.
  - (4) "Vehicle" shall include any vehicle as defined in §101(80) of this title, any off-highway vehicle as defined in § 101(39) of this title and any moped as defined in §101(31) of this title.
  - (5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.
  - (6) "Alcohol concentration of .16 or more" shall mean:
    - a. An amount of alcohol in a sample of a person's blood equivalent to .16 or more grams of alcohol per hundred milliliters of blood; or
    - b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.
  - (7) "Drug" shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.
- (d) Whoever is convicted of a violation of subsection (a) of this section shall:
- (1) For the first offense, be fined not less than \$ 230 nor more than \$ 1,150 or imprisoned not more than 6 months or both, and shall be required to complete an alcohol evaluation and a course of instruction and/or rehabilitation program



pursuant to § 4177D of this title, which may include confinement for a period not to exceed 6 months, and pay a fee not to exceed the maximum fine. Any period of imprisonment imposed under this paragraph may be suspended.

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.

(1) Evidence obtained through a preliminary screening test of a person's breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter between a law enforcement officer and the person shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this Code has occurred. However, such evidence may only be admissible in proceedings for the determination of guilt when evidence or argument by the defendant is admitted or made relating to the alcohol concentration of the person at the time of driving.

(h)(1) For the purpose of introducing evidence of a person's alcohol concentration pursuant to this section, a report signed by the Forensic Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist who performed the test or tests as to its nature is prima facie evidence, without the necessity of the Forensic

Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist personally appearing in court:

- a. That the blood delivered was properly tested under procedures approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, or the Delaware State Police Crime Laboratory;
- b. That those procedures are legally reliable;
- c. That the blood was delivered by the officer or persons stated in the report; and,
- d. That the blood contained the alcohol therein stated.

(2) Any report introduced under paragraph (1) of this subsection must:

- a. Identify the Forensic Toxologist, Forensic Chemist or State Police Forensic Analytical Chemist as an individual certified by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory or any county or municipal police department employing scientific analysis of blood, as qualified under standards approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory to analyze the blood;
- b. State that the person made an analysis of the blood under the procedures approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory; and,
- c. State that the blood, in that person's opinion, contains the resulting alcohol concentration within the meaning of this section.

Nothing in this subsection precludes the right of any party to introduce any evidence supporting or contradicting the evidence contained in the report entered pursuant to paragraphs (1) and (2) of this subsection.

(3) For purposes of establishing the chain of physical custody or control of evidence defined in this section

which is necessary to admit such evidence in any proceeding, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery stated, without the necessity of a personal appearance in court by the person signing the statement, in accordance with the same procedures outlined in § 4331(3) of Title 10.

- (4) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 15 days prior to the trial, require the presence of the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist, or any person necessary to establish the chain of custody as a witness in the proceeding. The chain of custody or control of evidence defined in this section is established when there is evidence sufficient to eliminate any reasonable probability that such evidence has been tampered with, altered or misidentified.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State*, Del. Supr., 281 A.2d 606 (1971); *Lewis v. State*, Del. Supr., 626 A.2d 1350 (1993) Subsections (a) and (b) [of Sec. 4177] must be read together and defendant may “be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol.”

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 *Del. C.* § 301. *United States ex rel. Crosby v. Delaware*, 346 F. Supp. 213 (D. Del. 1972). A reasonable doubt is “not meant to be a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful

examination and conscientious consideration of the evidence. *State v. Matushefske*, Del. Super., 215 A.2d 443 (1965).

The State also has the burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* § 232. *James v. State*, Del. Supr., 377 A.2d 15 (1977). *Thornton v. State*, Del. Supr., 405 A.2d 126 (1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all.

If the Court cannot do this, the Court must give credit to that portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest that they may have concerning the nature of the case.

## **OPINION AND ORDER**

Based upon the evidence presented at trial, the Court finds the State has proven beyond a reasonable doubt that the defendant was driving his motor vehicle under the influence of drugs in violation of 21 *Del.C.* §4177(a). All toxicology reports performed on the defendant were received into evidence at trial without objection. No request was ever made by the defense pursuant to §4177(h)(4) for any person in the chain of custody, State Chemist or State Phlebotomist. The chain of custody was established in the trial record without objection and no evidence has been offered that such evidence was not admissible or had been tampered. These records clearly indicate the defendant had the marijuana in his blood.

Considering all of the other trial evidence outlined in the Statement of Facts, the Court finds that State has met its burden beyond a reasonable doubt on the instant charge pursuant to 11 *Del.C.* §301.

This matter shall be scheduled for sentencing on this Court's next available Sentencing Calendar with notice to Counsel of Record.

**IT IS SO ORDERED** this 6<sup>th</sup> day of November, 2009.

\_\_\_\_\_/S/  
John K. Welch  
Judge

/jb  
cc: Ms. Diane Healy  
CCP, Criminal Division